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In the Supreme Court of the United States

No. 1497.

OCTOBER TERM, 1970.

JEAN E. COOK,
Administratrix of the Estate of Charles H. Cook,
Deceased,
Petitioner,

vs.

UNITED STATES STEEL CORPORATION
and
DEN NORSKE AMERIKALINJE, A/S,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF OF RESPONDENTS IN OPPOSITION.

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COUNTER QUESTIONS PRESENTED.

1. Was the Court of Appeals correct in holding that an award of prejudgment interest would amount to an abuse of discretion in a maritime case where liability was contested for two years, the type and amounts of damage sustained are still contested, discovery on the question of compensatory damages was delayed upon the motion of the claimant and the District Court specifically found the shipowners proceeded expeditiously and did not need the discipline of a prejudgment interest payment?

2. Was the Court of Appeals correct in holding that awards for future damages were to be discounted to present value in accordance with this Court's decision in *Chesapeake and Ohio Ry. Co. v. Kelly,* 241 U.S. 485 (1916), without consideration of the effects of inflation upon either the purchasing power or earning power of the dollar?

3. Was the decision of the Court of Appeals in conflict with prior decisions of this Court or with decisions of other Courts of Appeals?

STATUTES INVOLVED.

Shipowners concede the application of the Jones Act, 46 U.S.C. § 688, and, by reference, the F.E.L.A., 45 U.S.C. § 51 et seq., with respect to the claim against United States Steel. However, the Death on the High Seas Act, 46 U.S.C. § 761 et seq., has no application to this case since the sinking of the *Cedarville* and resulting death of Petitioner's decedent, Charles Cook, occurred in the waters of the Great Lakes in the Straits of Mackinac between Lake Huron and Lake Michigan, and not on the High Seas. Section 767 of the Death on the High Seas Act expressly provides that that Act is not applicable to the Great Lakes.

COUNTER STATEMENT OF THE CASE.

For additional facts relating to the proceedings below, reference is made to the Shipowners' Counter Statement of the Case in their Brief of Respondents in Opposition to the Lamp Petition, No. 1370, pp. 2 to 4.

With respect to Cook claim, of the total award in the District Court of $194,491.00, $12,150.00 was awarded as prejudgment interest.

ARGUMENT.

I. The Court of Appeals Was Correct in Holding that an Award of Prejudgment Interest in This Case Would have Amounted to an Abuse of Discretion.

Petitioner, in claiming that the Court of Appeals erred in holding that an award of prejudgment interest amounted to an abuse of discretion, has advanced no arguments requiring any further response than that set forth in Brief of Respondents in Opposition to the Lamp Petition, No. 1370, which is confined to the sole issue of prejudgment interest, and in Brief of Respondents in Opposition to the Fuhrman Petition, No. 1475, particularly pp. 35-38.

The Court of Appeals correctly followed the rule of this Court in *The Scotland,* 118 U.S. 507 (1886).

II. The Court of Appeals Was Correct in Holding that an Award for Future Damages Is to Be Discounted to Present Value in Accordance with This Court's Decision in Chesapeake & Ohio Ry. Co. v. Kelly.

Except in two limited respects, Petitioner's claim that the Court of Appeals erred in holding an award for future damages is to be discounted to present value in accordance with this Court's decision in *Chesapeake & Ohio Ry. Co. v. Kelly,* 241 U.S. 485 (1916), requires no further answer than that set forth in Brief of Respondents in Opposition to the Fuhrman Petition, pp. 31-35.

It should be noted, however, that Petitioner is inaccurate in stating that the District Court's decision to take into account the effect of future inflation was based upon the testimony of experts offered by both sides. The District Court based its assumptions concerning inflation, not on the testimony of any expert, but on a document not in evidence, *The Economic Report of the President to*

Congress, January 1969 (31). Thus, the District Court found an offset for inflation in all five death claims before it, including those claims (Haske, Jones and Fuhrman) where there was no economic expert testimony even remotely related to the question of inflation. Moreover, Petitioner's expert assumed a probable rate of inflation of between 1½% to 2% per annum (733, 749) and even this limited rate of inflation did not begin to approach the rate of 4% per annum assumed by the District Court.

Further, contrary to Petitioner's assertion that no other cases in the federal system have dealt with the issue of inflation, this question has been before other courts and they have reached precisely the same conclusion as the Court of Appeals below. See *McWeeney v. New York, N.H. & H. R.R. Co.*, 282 F.2d 34 (2d Cir., 1960) cert. den. 364 U.S. 870 (1960), and *Armentrout v. Virginian Ry. Co.*, 72 F. Supp. 997 (S.D. W.Va., 1947), cited with approval in the *McWeeney* case, both of which are discussed more fully in Brief of Respondents in Opposition to the Fuhrman Petition, No. 1475, pp. 33-34.

The Court of Appeals was correct in reversing the District Court and remanding the case with the direction that the District Court is to discount the awards for future damages to present value in accordance with generally accepted actuarial principles and the *Kelly* case.

III. The Decision of the Court of Appeals Is Consistent With the Decisions of This Court and Those of the Courts of Appeals of Other Circuits.

Petitioner's final argument groups together a number of essentially unrelated points concerning various items of damage which the Court of Appeals remanded for further determination by the District Court or disallowed.

Petitioner complains that the Court of Appeals disallowed an award to the widow for care and counsel, but significantly fails to cite one case allowing such an award in a maritime wrongful death action. As discussed more fully in Brief of Respondents in Opposition to the Fuhrman Petition, No. 1475, pp. 27-30, the Court of Appeals correctly followed this Court's decision in *Michigan Central R.R. Co. v. Vreeland,* 227 U.S. 59 (1912).

Petitioner also claims that the Court of Appeals erred in rejecting the awards made by the District Court for loss of earning capacity. As discussed more fully in Brief of Respondents in Opposition to the Fuhrman Petition, No. 1475, pp. 22-27, the Court of Appeals' decision was consistent with its decision in *Imperial Oil Ltd. v. Drlik,* 234 F.2d 4 (1956), and the decisions of other Courts in similar cases. *Conte v. Flota Mercante Del Estado,* 277 F.2d 664, 669 (2d Cir., 1960); *Petition of Marina Mercante Nicaraguense, S.A.,* 248 F. Supp. 15 (S.D. N.Y., 1965), modified 364 F.2d 118 (2d Cir., 1966) cert. den. 385 U.S. 1005 (1967); *Candiano v. Moore-McCormack Lines, Inc.,* 382 F.2d 961 (2d Cir., 1967) cert. den. 390 U.S. 1027 (1968); *Moore-McCormack Lines, Inc. v. Richardson,* 295 F.2d 583 (2d Cir., 1961) cert. den. 368 U.S. 989 and 370 U.S. 937 (1962); *Gardner v. National Bulk Carriers, Inc.,* 333 F.2d 676 (4th Cir., 1964); *Downie v. United States Lines Co.,* 359 F.2d 344 (3d Cir., 1966) cert. den. 385 U.S. 897

(1966) which cites with approval *Tullos v. Corley,* 337 F.2d 884 (6th Cir., 1964). Again Petitioner significantly fails to cite one case in conflict with the Court of Appeals' decision on this issue.

The one case to which Petitioner does refer this Court, *Story Parchment Co. v. Patterson Parchment Paper Co.,* 282 U.S. 555 (1931), is singularly inappropriate. That case was an anti-trust action tried to a jury and was entirely unrelated to the determination of compensatory damages in a maritime wrongful death case by a District Court sitting without a jury. Moreover, there is nothing in the *Story Parchment* case which is in conflict with the Court of Appeals' decision. In particular, the Court of Appeals did not require that Petitioner prove her damages to "a mathematical certainty"; see, e.g., the action of the Court of Appeals in affirming awards of the District Court for fringe benefits as not being "clearly erroneous" even though the District Court stated it was "impossible to evaluate authentically" these items of loss and the Court of Appeals' action in affirming an award for pain and suffering even though there was no evidence of the circumstances of Mr. Cook's death.

Petitioner has cited no conflict between the Court of Appeals' decision herein and the numerous decisions in other Circuits which have dealt directly with the problem of determining of damages in a maritime wrongful death action.

The Court of Appeals correctly applied the principles of law enunciated by this Court as well as the Courts of all other Circuits relative to the determination of compensatory damages.

CONCLUSION.

For the reasons stated, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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